United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with P/S

76-1310

To be argued by
STEVEN M. SCHATZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1310

B P/S

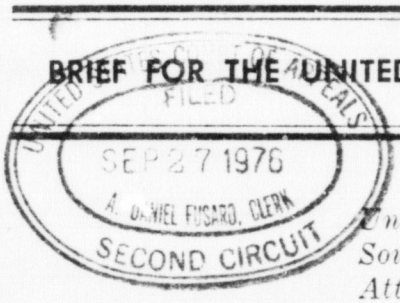
UNITED STATES OF AMERICA,
Appellee,

—v.—

JAMES EDWARD NELSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA



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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

James Edward Nelson appeals from a judgment of conviction entered on June 21, 1976 in the United States District Court for the Southern District of New York, following a plea of guilty before the Honorable Lawrence W. Pierce, United States District Judge. Pursuant to a stipulation entered into between the parties, Nelson appeals the denial of pre-trial motions to suppress certain tangible evidence seized at the time of his arrest and confessions made subsequent thereto.*

* In accepting the plea, Judge Pierce stated, "The Court has no objection to the defendant appealing the ruling with respect to the suppression motion.... There is no objection on my part and none on the government's part." (5/21/76 Tr., 3). Appeals from pleas of guilty of denials of suppression motions pursuant to stipulations have been authorized previously by this Court. *See, e.g., United States* v. *Burke*, 517 F.2d 377, 378-9 (2d Cir. 1975); *United States* v. *Faruolo*, 506 F.2d 490, 491 (2d Cir. 1974); *United States* v. *Rothberg*, 480 F.2d 534, 535 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

Indictment 76 Cr. 287, filed on March 23, 1976, charged in three counts that Nelson and Daniel Louis Harvey had committed the March 8, 1976 armed robbery of the First National City Bank, located at 700 Columbus Avenue, New York, New York. Count One charged Nelson and Harvey with bank robbery in violation of Title 18, United States Code, Sections 2113(a) and 2; Count Two charged the two defendants with armed robbery in violation of Title 18, United States Code, Sections 2113(d) and 2. Count Three charged Nelson and Harvey with using and unlawfully carrying a firearm during the commission of the crimes charged in Counts One and Two, in violation of Title 18, United States Code, Sections 924(C)(1) and (2) and 2.

On April 23, 1976, Nelson filed a motion to suppress "any and all statements, admissions, and/or confessions made by" him, and "all monies, clothing and all other evidentiary matter seized from Room 909 of the Whitehall Hotel on March 8, 1976," (Nelson's Pre-trial Motion). On May 11, 1976, an evidentiary hearing was held and in an Endorsement Order, filed May 13, 1976, Judge Pierce denied Nelson's motion in all respects.*

On May 21, 1976, Nelson pleaded guilty to Count Two of the indictment upon condition that the Government would not object to Nelson's appealing the denial of the pre-trial suppression motions. (5/21/76, Tr. 2-3) During the plea allocution, Nelson admitted participating in the armed bank robbery. (5/21/76, Tr. 12-17) Nelson stated that he wore a mask and "made sure that anybody [sic] didn't walk out the door." (*Id.*, at 13).

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* By a separate order, dated May 11, 1976, the Court denied defendant Harvey's various suppression motions. Defendant Harvey subsequently pleaded guilty and was sentenced to a term of imprisonment of twenty years.

Nelson further admitted that he was the one who went behind the teller's cage to get the money and that he took in excess of $20,000. (*Id.*, at 14).

On June 21, 1976, Judge Pierce sentenced Nelson to a term of imprisonment of fifteen years, which sentence he is currently serving.

Statement of Facts

The Government established at the suppression hearing that shortly after the armed robbery of the First National City Bank branch at 700 Columbus Avenue, the two robbers were chased by Police Officer Carr, who eventually apprehended Nelson's accomplice Daniel Harvey and removed from his possession a loaded gun. (Tr. 24).*

New York City Police Detective Joseph Gannon then interviewed the victim teller who described Harvey's accomplice as a black man, wearing a blue coat, knit cap and a stocking mask. (Tr. 25).

Following Harvey's apprehension, he was taken to the 24th Precinct and advised of his rights. (Tr. 12-4, 29-30). Sometime after 11:15 A.M. Harvey told Detective Gannon that the name of the other bank robber was James Nelson and that he could be located at Room 909 of the Whitehall Hotel on West 100th Street. (Tr. 11, 15, 17). Harvey gave a brief description of Nelson and stated that Nelson had worn a long blue coat, black

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* The abbreviation "Tr." refers to the transcript of the suppression hearing; "GX" refers to the Government Exhibits which were admitted for the purposes of the suppression hearing; "Br." refers to Nelson's Brief on Appeal.

knit hat and a stocking mask during the robbery. Harvey then described the apartment at which Nelson could be found. (Tr. 16). During the course of the interview Detective Gannon periodically met with other police officers as well as FBI agents to discuss the case. Eventually, they decided to attempt to locate Nelson. (Id.).

While Gannon was conferring with other police officers and federal agents, he was told that Harvey wanted to speak with him again. (Tr. 17-8). Harvey then told Gannon that if Nelson were not at the Whitehall Hotel, he might be at the Hotel Monterey, on 94th Street (Tr. 18). Harvey said that "[i]n any event, you had better get there in a hurry because I know he is going to be checking out, I know he is going to be leaving." (Tr. 18).

More FBI agents arrived at the 24th Precinct between 12:15 and 12:30 P.M., and were told that one of the bank robbers was in custody and that he had furnished both the identity and the two possible locations at which his accomplice could be located. (Tr. 45). The agents were told that Harvey described Nelson as a 5 foot seven-inch black male, in his mid-20's, who had a full beard. The agents were also told that time was of the essence and that if they did not act with dispatch they might miss him. (Tr. 46). The agents then divided into two units and proceeded to the alternative locations suggested by Harvey.

Detective John Stein and FBI Agents Alan Dibona and Joseph Martinolich arrived at the Whitehall Hotel at about 12:40 P.M. (Tr. 36, 72).* While Agents

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* The transcript erroneously refers to Agent Joseph Martinolich as Agent Joseph "Martin Aldrich".

Dibona and Martinolich went to the ninth floor to cover the door to prevent the suspect's escape, Stein questioned the desk clerk and confirmed Harvey's information that Nelson was a black male who was in Room 909 at that time. (Tr. 31, 36).

Upon their arrival on the ninth floor, Dibona and Martinolich heard men's voices and activity in the apartment. While waiting for other agents to arrive, they saw the door to Room 909 abruptly open. Nelson and another man ran out of the apartment into the hall in the direction of Dibona. (Tr. 46, 77-8). Agent Dibona testified that he recognized one of the men as fitting the description of the bank robbers and that he stated, "FBI . . . freeze." (Tr. 46-7, 78-80).

The two men then ran back into the apartment followed closely by Agent Dibona, who kicked open the door which had not yet clicked shut. (Tr. 47, 81) Dibona then observed Nelson attempting to climb out of the window onto a ledge, at which point Nelson and the other individual, Andre Gasque were placed under arrest for bank robbery. Both men were advised of their rights by Agent Dibona.* (Tr. 47-8). The FBI agents were then joined by Detective Stein who again advised Nelson of his rights. (Tr. 33-4). Nelson told Stein that he did not want to say anything in the apartment. (Tr. 34).

Once in the room Agent Dibona observed an open suitcase on the floor about five or ten feet from the doorway. In the suitcase were trousers with large bundles of money protruding from the pants. (Tr. 48, 51). Ap-

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* The indictment did not name Mr. Gasque as a defendant and the complaint as to him has been dismissed.

proximately three feet from the suitcase was a chair on which rested a blue trench coat and blue corduroy jacket fitting the description of the clothing worn by the bank robber. (Tr. 48-9).*

At about 1 P.M., the agents walked Nelson to the nearby 24th Police Precinct. (Tr. 51-52). There, at about 1:30, Detective Thomas Hallinan re-advised Nelson of his rights and Nelson stated that he did not want an attorney. (Tr. 86-87). After providing Hallinan with certain pedigree information, Nelson told Hallinan that he did not want to talk to him anymore. When Hallinan advised Nelson that he was being turned over to federal authorities, Nelson said it would be "okay" if he were questioned by the FBI. (Tr. 87). Hallinan testified that Nelson appeared to be relaxed and to understand everything that was being said to him. (Tr. 88).

At about 3 P.M., Nelson was interviewed at FBI headquarters by Special Agent Edward Walker. After being fully advised of his rights, and signing an advice of rights form, (GX 12), Nelson stated that he wished to think the matter over before answering any questions, at which point the questioning ceased. (Tr. 90). Then, while Nelson was being fingerprinted, he told the agents that he wished to make a statement. (Tr. 90).

Nelson admitted his involvement, claiming that he had participated in the robbery both to pay for his drug habit and to pay for his room at the Whitehall Hotel. (Tr. 91). He stated that while Harvey covered the bank employees, he went behind the counter to gather the

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* Later, at FBI headquarters, Agent Dibona checked the pockets of this clothing and found a nylon stocking mask and a folder which contained various items of identification in the name of James Nelson. (Tr. 49-50).

money (Id.) Nelson said that after the robbery he returned to the Whitehall Hotel where he was arrested, and that when the police had entered the room, the suitcase was knocked over and the money spilled out. (Tr. 92).

Agent Walker took two statements from Nelson, one of which detailed Nelson's own involvement in the crime and the other which explained Harvey's role as well. (Tr. 93). Nelson signed the statements in Walker's presence. (Tr. 94). After the interview, Nelson told Walker of his heroin addiction but did not claim at any time that he felt ill. (Tr. 96). Indeed, Agent Walker inquired if Nelson felt all right and Nelson responded that he felt fine. (*Id.*) Furthermore, Nelson's speech was not slurred but was clear and coherent. (Tr. 97). The photographing and processing of Nelson were completed at approximately 6:00 P.M., at which time he was transported to the Metropolitan Correctional Center for overnight lodging. (Tr. 95).

The next morning, the three suspects were taken to the United States Attorney's Office where a complaint was drafted and the defendants interviewed. Nelson was interviewed for about twenty minutes. (Tr. 62) After being fully advised of his rights, Nelson was shown his statements of the prior day. (Tr. 61). In response to specific questions, Nelson stated that the prior statements were accurate, and were voluntarily given. After acknowledging that he had worn a blue corduroy leisure suit and a blue trench coat during the robbery, Nelson indicated that he did not want to answer any more questions and that he wanted a lawyer, at which point the interview stopped. (*Id.*)

ARGUMENT

POINT I

The arrest of Nelson and the subsequent seizure of evidence in plain view were lawful.

Nelson contends that his arrest was illegal and that accordingly the seizure in Room 909 of tangible evidence in "plain view" was invalid. The precise basis for this contention is unclear from Nelson's brief. Whatever the ground, however, the claim is totally devoid of merit. The arrest and seizure were valid in all respects.

The arresting officers had more than probable cause to believe that Nelson had committed the bank robbery. Harvey, an admitted participant in the crime who had been apprehended fleeing from the bank, not only provided a detailed description of Nelson and what he wore at the robbery but also provided a detailed description of Room 909 at the Whitehall Hotel. (Tr. 11, 15-18). Furthermore, Harvey's information was substantially corroborated in all salient respects. Bank personnel confirmed that the robbery was committed by two black men and that one of the robbers wore a long blue coat, knit cap and a stocking mask. (Tr. 25). Officer Carr had chased both perpetrators before apprehending Harvey (Tr. 24).

Thus, by the time FBI Agents Dibona and Martinolich reached the ninth floor of the Whitehall Hotel there was probable cause to arrest Nelson since the facts and circumstances known to them were sufficient "to warrant a prudent man in believing that [Nelson] had committed . . . the offense." *Raffone* v. *Adams*, 468 F.2d 860, 865 (2d Cir. 1972), citing *Beck* v. *Ohio*, 379 U.S. 89, 91

(1964). Rather than make an immediate arrest, Agents Dibona and Martinolich showed restraint and waited for Detective Stein to confirm further with the desk clerk the information which Harvey had provided. Meanwhile, however Nelson and Gasque, apparently apprised that the authorities had arrived, ran out of Room 909 (Tr. 46, 77-8). Agent Dibona recognized Nelson as fitting the description of one of the bank robbers, and stated "FBI . . . freeze" (Tr. 46-7). When the two men ignored the admonition and fled back into the room, the agents followed and placed them under arrest. Under these circumstances it can hardly be denied that the facts and circumstances overwhelmingly supported a finding of probable cause.*

This is not a case in which the arresting officers merely relied on the uncorroborated information of a professional informant. See *e.g.*, *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969). Here, an accomplice, apprehended immediately after the commission of the crime, made a statement against his own penal interest admitting his own culpability and providing the name and probable location of his colleague in crime. See *United States* v. *Harris*, 403

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* Nelson also seems to claim that it was somehow error for Judge Pierce to sustain the government's objection to the hypothetical question whether Agent Dibona had the "intention to knock on the Room of 909 when [he] got off the elevator?" (Tr. 76). This argument is totally without merit. We submit that Judge Pierce properly ruled that the pertinent inquiry was into "what actually occurred." (Tr. 76). Moreover, counsel for Nelson had already been permitted on cross-examination to inquire whether Dibona initially intended to arrest the occupant of Room 909 when he reached the ninth floor. Dibona had already responded that it depended on whether "everything fit" (Tr. 75-6). Thus, in fact, counsel had not been precluded from this line of inquiry. Indeed, counsel for Nelson cross-examined Dibona extensively (Tr. 72-81).

U.S. 573, 583-4 (1971) (opinion of Burger, C.J.). Furthermore, the information provided by Harvey had been amply corroborated both by the bank witnesses and by Nelson's appearance and conduct when he attempted to flee Room 909. See *United States* v. *Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States* v. *Burke*, 517 F.2d 377 (2d Cir. 1975); *United States* v. *Santana*, Dkt. No. 75-19, 44 U.S.L.W. 4970, 4971 (U.S. June 22, 1976). Thus, there was ample probable cause to arrest Nelson for bank robbery.*

Nelson also apparently argues that rather than arrest him, the agents should have sealed off the area and sought an arrest warrant. (Brief at 9). This contention is frivolous.

The exigencies of circumstances justified the arrest of Nelson, without warrant, on the grounds of "hot pursuit". It is undisputed that time was of the essence. An armed bank robbery had just occurred and one of its participants had told the police that they "had better get there in a hurry because I know he [Nelson] is going to be checking out, I know he is going to be leaving" (Tr. 18). Accordingly, the police and the FBI rushed to the Whitehall Hotel. After the agents observed the two men attempt to flee from Room 909 "the exigencies of the situation" rendered justifiable the agents' pursuit

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* The cases upon which Nelson relies are totally inapposite: *Silverman* v. *United States*, 365 U.S. 505 (1961) involved the unauthorized eavesdropping of conversations by electronic listening devices; *Jones* v. *United States*, 357 U.S. 493 (1958) involved the warrantless, night-time intrusion into a private home to search for contraband; *Brinegar* v. *United States*, 338 U.S. 160 (1949) related to the existence of probable cause in the context of automobile searches.

of the suspected bank robbers back into the hotel room. *Warden* v. *Hayden*, 387 U.S. 294, 298 (1967); see also *McDonald* v. *United States*, 335 U.S. 451, 454 (1948); *United States* v. *Barone*, 330 F.2d 543, 545 (2d Cir.), *cert. denied*, 377 U.S. 1004 (1964). Moreover, Nelson's arrest occurred in the daytime, immediately following the agents' observation of him in the hallway of a hotel, a public place. *United States* v. *Santana*, *supra*;* *cf. United States* v. *Watson*, 423 U.S. 411 (1976).

Since the agents' presence in the hotel room was lawful, their seizure of the money, suitcase and clothing, all of which were in plain-view, was also lawful. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464-473 (1971); see *United States* v. *Canestri*, 518 F.2d 269, 274 (2d Cir. 1975); *United States* v. *Rollins*, *supra*, 522 F.2d at 166; cf. *United States* v. *Santana supra*, 44 U.S.L.W. at 4972.**

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* In *Santana*, as in this case, the defendant was arrested by police in "hot pursuit" as she tried to retreat into her residence. The Supreme Court held that the doctrine of "hot pursuit [was] sufficient to justify the warrantless entry into Santana's house." *Id.* 44 U.S.L.W. at 4972.

** Nelson's off-hand assertion that Agent Dibona did not comply with 18 U.S.C. § 3109, is without merit. First, Agent Dibona's statement "FBI . . . freeze" certainly apprised Nelson of the "officers' authority and purpose". *United States* v. *Artieri*, 491 F.2d 440, 444 (2d Cir.), *cert. denied*, 417 U.S. 949 (1974). Moreover, the exigent situation made it "unnecessary for [the agents] to announce their purpose in making the entry". *Id.* It is also questionable whether 18 U.S.C. § 3109 applies to situations in which the arrest is made "in hot pursuit" of a defendant retreating into his dwelling. Cf. *United States* v. *Santana*, *supra*. Finally, since Nelson did not raise this contention below, any claim that he might have raised concerning this matter has been waived. See *United States* v. *Rollins*, *supra*, 522 F.2d at 165; *United States* v. *Indiviglio*, 352 F.2d 276, 277 (2d Cir. 1965) (*en banc*) *cert. denied*, 383 U.S. 907 (1966).

POINT II

Nelson's confession was voluntary.

Nelson contends that his "confessions were involuntary" and therefore it was error for Judge Pierce to deny his motion to suppress. This argument is entirely devoid of merit.

The evidence at the suppression hearing revealed that Nelson was arrested sometime between 12:40 and 1 p.m. on the day of the robbery. (Tr. 36, 51-2, 73). He was immediately and fully advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), by both Agent Dibona and Detective Stein. (Tr. 33-4, 47-8). Nelson told Stein that he did not wish to say anything in the apartment, which request was fully respected. (Tr. 34). At about 1 p.m., Nelson was readvised of his rights at the 24th Police Precinct by Detective Hallinan. (Tr. 86-7). Although Nelson said that he did not wish to talk to Hallinan he specifically said that it would be "okay" if he were questioned by the FBI. (Tr. 87).

Later, at FBI headquarters, Nelson was readvised of his rights and signed an advice of rights form (Tr. 90; GX 12). When Nelson stated that he wished to think the matter over before answering any questions, he was taken to be fingerprinted. At that point, at his own initiative, he said that he wished to make a statement, and then confessed. (Tr. 90). The next morning, at the United States Attorney's Office, Nelson confirmed that his prior statements had been both accurate and voluntarily given. (Tr. 61).

After a full evidentiary hearing Judge Pierce found that Nelson's statements "were preceded by full and complete Miranda warnings [and] [t]hose statements were

voluntary and are admissible; 18 U.S.C. § 3501." (Endorsement Order, May 13, 1976). This finding alone substantially vitiates Nelson's attack on the voluntariness of his confession. See, *e.g.*, *United States* v. *Vigo*, 487 F.2d 295, 299 (2d Cir. 1973); *United States* v. *Marrero*, 450 F.2d 373, 376-77 (2d Cir. 1971), *cert. denied*, 405 U.S. 933 (1972); *United States* v. *Lopez*, 450 F.2d 169, 170 (9th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972); *United States* v. *White*, 417 F.2d 89, 91-2 (2d Cir. 1969), *cert. denied*, 397 U.S. 912 (1970).

Nelson's only apparent contention is that "the agent had an absolute obligation to inquire as to whether or not heroin use affected his capacity for self-determination." (Brief, at 11).

First, there is no *per se* rule mandating that confessions given under the influence of narcotics are involuntary. See *United States* v. *Arcediano*, 371 F. Supp. 457, 466 (D. N.J. 1974); *United States* v. *Hollis*, 387 F. Supp. 213, 220 (D. Del. 1975). In any event, however, the evidence is uncontradicted that after being apprised of Nelson's heroin addiction, Agent Walker asked Nelson if he felt all right and Nelson responded that he felt fine. (Tr. 96). Furthermore, Nelson's speech was clear and coherent. (Tr. 97). Indeed, Detective Hallinan also testified that Nelson previously appeared to be relaxed and to understand everything that was being said to him. (Tr. 88).*

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* It should be noted that at no time did Nelson suggest that his drug addiction impaired his thought processes. He did not take the stand at the suppression hearing and his affidavit submitted prior to the hearing merely states, in conclusory terms and without any mention of narcotics addiction, that "I felt my free will was overcome and in effect, these statements were not voluntary." (Nelson Affidavit, April 16, 1976).

Under the foregoing circumstances Judge Pierce's finding that Nelson's statements were voluntarily made was not clearly erroneous and should not be disturbed. See *e.g.*, *United States* v. *Lucchetti*, 533 F.2d 28, 36-37 (2d Cir. 1976).*

CONCLUSION

Nelson's motions to suppress were properly denied. The judgment of conviction should be affirmed.

Respectfully submitted,

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* The cases upon which Nelson relies are inapposite and merely set forth the basic criteria in determining whether a confession was voluntarily made. See *Clewis* v. *Texas*, 386 U.S. 707 (1967); *Reck* v. *Pate*, 367 U.S. 433 (1961); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961).

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Steven M. Schatz being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 27th day of September, 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Joseph F. STONE, ESQ.
277 Broadway
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Steven M. Schatz

Sworn to before me this
27th day of September, 1976

Maria A. Morales

MARIA A. MORALES
NOTARY PUBLIC, State of New York
No. 31 - 4521851
Qualified in New York County
Term Expires March 30, 1978